



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

AUG 16 2011

OFFICE OF
REGIONAL ADMINISTRATOR

Ms. Sara Parker Pauley
Director
Missouri Department of Natural Resources
P.O. Box 176
Jefferson City, Missouri 65102

Dear Ms. Pauley:

The United States Environmental Protection Agency has completed its review of the revisions to Missouri's Water Quality Standards under Missouri's Code of State Regulations (CSR), Division 20, Chapter 7. The Missouri Department of Natural Resources sent the revisions package to the EPA for review, as required under federal regulations at 40 CFR §131.20, in a letter dated November 2, 2009. The new or revised water quality standards were approved by the Missouri Clean Water Commission on July 1, 2009, published in the Code of State Regulations on September 30, 2009, and formally submitted to the EPA with the Attorney General certification on November 5, 2009.

Under section 303(c) of the Clean Water Act (33 U.S.C. § 1313(c)), states are to review their WQS at least every three years and submit any revised or new WQS to the EPA for review and approval. Federal regulations at 40 CFR §§ 131.20, 131.21, and 131.22 implement these requirements. The November 5, 2009, submission addressed by this letter encompasses a set of revisions of WQS proposed by the MDNR and adopted by the MCWC on July 1, 2009. The proposed rules were published in the Missouri Register on March 2, 2009, which marked the beginning of the public comment period that ended on May 13, 2009. The MCWC held a public hearing on May 6, 2009, to receive public input and comment on the proposed WQS revisions. Based on our review, Missouri's public participation process is consistent with and satisfies the procedural requirements of 40 CFR § 131.20.

Missouri's previous review and revision of its WQS regulations at 10 CSR 20-7.031 was completed and adopted by the MCWC in 2005. On March 28, 2006, Missouri submitted new and revised standards to the EPA. The EPA reviewed Missouri's submission and took action to partially approve and partially disapprove them in its decision letters to the MDNR dated April 28, 2006; February 20, 2007; April 27, 2007; and June 30, 2009. In addition, the EPA made several determinations regarding whole body contact recreation use designations. On October 30, 2006, the EPA determined new and revised standards were necessary for 99 waters. On December 12, 2008, and October 29, 2009, the EPA determined new and revised standards were necessary for a segment of the Mississippi River. Several of the revisions contained in the MDNR's November 5, 2009, WQS submission are in response to the EPA's decisions and determinations.

TODAY'S DECISION

As the Regional Administrator, I am charged with the responsibility of reviewing and approving or disapproving new or revised state WQS under section 303(c) of the CWA. With this letter, the EPA is approving a portion of the new or revised WQS submitted by the MDNR. The EPA is not taking action



on certain provisions included in the MDNR's submission that are not new or revised WQS. The provisions addressed in today's decision are listed below. The enclosure to this letter provides a more detailed description of the EPA's rationale for approving or disapproving the new or revised WQS and for not taking action on provisions that are not new or revised WQS.

Section 1 – Items EPA is Approving

- A. 10 CSR 20-7.031 (1) Definitions (K) *Escherichia coli*
- B. 10 CSR 20-7.031 (4) Specific Criteria (C) Bacteria
- C. 10 CSR 20-7.031 Table A – Bacteria Criteria
- D. 10 CSR 20-7.031 Revisions to Copper and Zinc Criteria
- E. Table K: Site-Specific Criteria for Sni-a-Bar Creek
- F. Table H: Revisions to Stream Class
- G. Table H: Resegmentation of Classified Waters
- H. Table H: New Water Bodies Added
- I. Table H: Water Bodies Deleted
- J. Table H: Corrected Uses for Platin Creek (WBID 1731)
- K. Table G: Aquatic Life Used Added to Milan Lake North (Previously named Milan Lake (Old)) (WBID 7144)
- L. Table G: Deletion of Two Lakes

Section 2 – Decision on Recreational Use Designations

- A. Approved – Whole Body Contact-Category B Use Designations for 77 Water Bodies
- B. Approved – Secondary Contact Recreation Use Designations for 162 Water Bodies
- C. Approved – Waters with No Recreational Use Designations for 5 Water Bodies
- D. Disapproved – Removal of Whole Body Contact-Category B Use Designations for 17 Water Bodies
- E. Disapproved – SCR Use Designations on 4 Water Bodies

Section 3 – Decision on Antidegradation

- A. Disapproved – 10 CSR 20-7.031 (2) Antidegradation (D)

Section 4 – Decision on Nutrient Criteria

- A. Approved – 10 CSR 20-7.031 (4) Specific Criteria (N) Nutrients (3), Table M
- B. Disapproved – 10 CSR 20-7.031 (3)(N) Nutrients and Chlorophyll (except as noted in Section 4.A. above)

Section 5 – Other Items EPA is Disapproving

- A. Removal of Irrigation Use on the Mississippi River (WBID 1707.03)
- B. East Fork Locust Creek and Little East Fork Locust Creek Site-Specific Dissolved Oxygen Criteria
- C. Removal of Drinking Water Supply Use on Prairie Home C.A. Lakes (WBID 7444)

Section 6 – Items on which EPA is Taking No Action

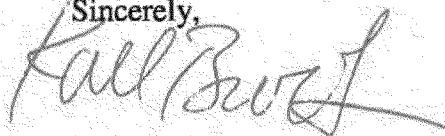
- A. Nonsubstantive Changes to 10 CSR 20-7.031

Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536) requires that federal agencies, in consultation with the United States Fish and Wildlife Service, ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat of such species. Regarding today's

approval actions, the EPA is making its decision subject to the outcome of consultation under section 7 of the Endangered Species Act.

We encourage Missouri to continue to update its WQS through the triennial review process. If you have any questions regarding this matter, please contact John DeLashmit, Chief, Water Quality Management Branch, at (913) 551-7821 or delashmit.john@epa.gov.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Karl Brooks', written in a cursive style.

Karl Brooks

Enclosure

cc: Leanne Tippet Mosby, MDNR
John Madras, MDNR
John Hoke, MDNR
Charlie Scott, U.S. Fish and Wildlife Service
Andy Roberts, U.S. Fish and Wildlife Service

SECTION 4 – DECISION ON NUTRIENT CRITERIA

4.A. Approved – 10 CSR 20-7.031 (4) Specific Criteria (N) Nutrients (3), Table M

As part of the 2009 submittal, Missouri included the establishment of site specific numeric nutrient criteria for lakes and reservoirs that exhibit trophic characteristics that are fully supportive of aquatic life. EPA evaluated available data for these lakes (found in Table M) and concurs with the state's conclusion that the site specific criteria found in Table M (which represent the geometric mean values for total phosphorous, total nitrogen, and chlorophyll) are supportive of aquatic life uses at these lakes.

These twenty-five lakes, identified in Table 13, represent lakes with the lowest TP, TN, and Chlorophyll concentrations in the State (within their particular ecoregions) and are located in the lowest 25th percentile (i.e., best) of all lakes with respect to their levels of nutrient contamination. Accordingly, as provided in EPA's guidance for development of nutrient criteria for lakes (and visually depicted in Figure 6.1 of the guidance) these lakes can be used in establishing reference condition, with the understanding that resulting nutrient values are

protective of aquatic life.¹⁹ Additionally, the TP, TN, and Chlorophyll values presented in Table M are consistent with the Regional Ambient Water Quality Benchmarks for protection of aquatic life use in Region 7 as developed by the Regional Technical Advisory Group (RTAG)²⁰ as well as Ambient Water Quality Criteria Recommendations for Lakes in Nutrient Ecoregion VI²¹, Ecoregion IX²², and Ecoregion XI²³.

Therefore, EPA concludes that the site specific criteria in Table M are consistent with the CWA and its implementing regulations at 131.11(a) as being protective of the designated use and based on a sound scientific rationale. EPA accordingly approves Table M of 10 CSR 20-7.031., and only the first sentence of 10 CSR 20-7.031 (4) (N) (3), striking “s” at the end of the word Table as well as “and N” so the sentence reads:

(1) *Nutrient criteria for lakes and reservoirs with site-specific criteria are listed in Table M.*

4.B. Disapproved – 10 CSR 20-7.031 (3)(N) Nutrients and Chlorophyll (except as noted in Sections 4.A., above)

Based upon its review, EPA does not believe the state has submitted nutrient criteria for lakes and reservoirs consistent with the requirements of the Clean Water Act in 40 CFR §131.11, with the exception noted above in Section 4.A. In reaching this conclusion, EPA relied upon the rule language found within 10 CSR 20-7.031(3)(N), the document cited as the technical basis for the numeric nutrient criteria or the Rationale, and the Responses from the state to EPA’s initial comments submitted to the state during the public comment period as found in Volume 34, No. 18 of the Missouri Register.

Section 303(c)(2)(A) requires that states adopt “water quality criteria for such waters based upon such [designated] uses.” EPA’s regulations at 40 CFR § 131.11(a)(1) require that “[s]tates must adopt those water quality criteria to protect the designated use. Such criteria must be based on sound scientific rationale.” The approach used to derive the criteria documented in the Rationale is not based on a sound scientific rationale because it does not include the data and other necessary information to allow others to independently reproduce the work. EPA attempted several times to replicate the analyses performed by the state and could not arrive at the same equations, values, and ultimately the same conclusions. For this reason, EPA cannot determine that the approach and resulting criteria are based on a sound scientific rationale as required by EPA’s regulations.

In addition, numeric nutrient criteria found at 10 CSR 20-7.031 (3)(N) and as described in the Rationale (with the exception of values noted above in Section 4.A.) fail to demonstrate

¹⁹ USEPA. 2000a. Nutrient Criteria Technical Guidance Manual: Lakes and Reservoirs. Office of Water, Office of Science and Technology. Washington, DC. USEPA-822-B00-001

²⁰ http://www.cpcb.ku.edu/progwg/html/assets/nutrientwg/Lake_RTAG_2011Jun.pdf

²¹ USEPA. 2000c. Ambient Water Quality Criteria Recommendations, Information Supporting the Development of State and Tribal Nutrient Criteria, Lakes and Reservoirs in Nutrient Ecoregion VI, EPA 822-B-00-008.

²² USEPA. 2000e. Ambient Water Quality Criteria Recommendations, Information Supporting the Development of State and Tribal Nutrient Criteria, Lakes and Reservoirs in Nutrient Ecoregion IX, EPA 822-B-00-011.

²³ USEPA. 2000f. Ambient Water Quality Criteria Recommendations, Information Supporting the Development of State and Tribal Nutrient Criteria, Lakes and Reservoirs in Nutrient Ecoregion XI, EPA 822-B-012-008.

that the values or approaches to numeric nutrient criteria will protect the designated aquatic life or recreational uses. In addition, the Rationale put forth by the state is silent with respect to the fundamental requirements of the Clean Water Act which require that water quality criteria to protect designated uses. Under current Missouri Law, lakes in Missouri (with the exception of three that receive a cold water designation) are afforded the following designated aquatic life use:

“General Warm-Water fishery -Level of protection assigned to waters in which naturally occurring water quality and/or habitat conditions allow year around maintenance of a diverse warm-water biota, including naturally reproducing populations of recreationally important fish species.”

The Rationale put forth does not provide any information, data, or studies to indicate that the established criteria will, “allow year around maintenance of a diverse warm-water biota,” and therefore it cannot be demonstrated to ultimately protect the designated uses for lakes within the state as required by the CWA and its implementing regulations.

The state must revise the criteria to clearly indicate which designated uses the criteria is intended to protect as well as supporting documentation to indicate that the criteria in fact will fully support the associated use. Additionally, supporting documentation needs to include the raw data and resulting statistical analyses so that the EPA may evaluate the soundness of the scientific rationale and protectiveness of the criteria pursuant to the requirement found at 40 CFR § 131.11(a)(1). At minimum, it is important that the revised criteria also take into account the following:

- When using a reference approach or least-disturbed approach, reference water bodies should not be impaired by anthropogenic nutrient pollution and the selection process for reference waters should not exclude high quality lakes based solely on a particular landcover class, especially where other landcover classes may be more representative of minimal human disturbance.
- If using a modeling approach to develop TP, the approach must result in criteria that are supportive of the designated use. Accordingly such an approach should use data from waters that support the use such as reference/least-disturbed lakes (or alternatively a lower percentile i.e., <25th percentile of the full population), the number of lakes (n) for each ecoregion should be sufficient to establish a robust relationship, and the resulting relationship should be shown to predict lake TP concentrations with sufficient accuracy to inform criteria derivation. If these conditions are not met, the approach may not be scientifically defensible.
- Chlorophyll and TN concentrations in reference/least-disturbed lakes should be evaluated to inform criteria derivation. Statistical relationships between TP and Chlorophyll, TP and TN, and TN and Chlorophyll can also be estimated and used to translate chlorophyll criteria to corresponding TN and TP criteria. These multiple lines of evidence can then be used to develop a more robust and scientific rationale, rather than relying on a single relationship.

The Agency would also support the state if they chose to modify their criteria beyond the original framework established within their Rationale, and offers assistance to develop such additional lines of evidence and analyses to provide additional scientific support.

Accordingly, the EPA disapproves 10 CSR 20-7.031 (3)(N) Nutrients and Chlorophyll (except as noted in Sections 4.A., above) of Missouri's WQS because the methods used and analyses conducted to develop the lake nutrient criteria are not based on a sound scientific rationale as they do not include the data and other necessary information to allow others to independently reproduce the work; it also fails to demonstrate that the values or approaches to numeric nutrient criteria will protect the designated aquatic life or recreational uses per 40 CFR §§131.6(b) and (c).